

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7590

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-7590

SEYMOUR LANDAU and all others similarly situated,

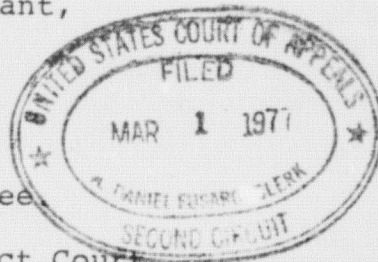
Plaintiff-Appellant,

-against-

THE CHASE MANHATTAN BANK, N.A.,

Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of New York



BRIEF FOR DEFENDANT-APPELLEE

THE CHASE MANHATTAN BANK, N.A.

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BRIEF FOR DEFENDANT-APPELLEE

THE CHASE MANHATTAN BANK, N.A.

STATEMENT OF THE ISSUES

The issues on this appeal are:

1. Whether the court below acted within its discretion and equitable powers by awarding attorney's fees of \$12,500, where the fund created for the class was \$24,984.75 or 35¢ for each class member, and where class

counsel requested \$132,112.50 based upon a fee application which was insufficiently detailed, included claims for non-compensable activities, and did not establish class counsel's normal billing rate in non-contingent matters or his fee arrangement with plaintiff.

2. Whether plaintiff may obtain disclosure of defendant's legal expenses, where there was no showing of the relevance or necessity for such information in the preparation or evaluation of plaintiff's fee application, and where defendant interposed a claim of attorney-client privilege.

STATEMENT OF THE CASE

This action was commenced in October 1972 charging that defendant had computed interest on loans and advances in violation of Section 108(5) of the New York Banking Law and in violation of the National Bank Act, 12 U.S.C. §§ 85, 86.

On November 8, 1973 an order was entered granting plaintiff's motion that this action be maintained as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, granting plaintiff's motion for summary judgment with respect to the issue of imposing interest on

check service charges and maintenance charges, and granting defendant's motion for summary judgment dismissing plaintiff's claim based on the alleged illegal compounding of interest.

Shortly after the order of November 7, 1973 was entered, plaintiff's attorney sought to tax attorney's fees as costs on the ground that he had acted as a private attorney general and had conferred a benefit upon the class. Defendant opposed this motion on the ground that there was no statutory authority for the allowance of attorney's fees and that the "special circumstances" required for the allowance of attorney's fees in the absence of such a statutory provision did not exist in this case. The court found that the right of plaintiff's attorney to recover attorney's fees depended upon the establishment of damages in favor of the class members and accordingly denied plaintiff's motion seeking attorney's fees without prejudice to renewal once damages were assessed (JA* 23-32).

Following the entry of this order the parties made various submissions concerning the measure of damages and the methods for computing damages. Defendant submitted an

* "JA" refers to the Joint Appendix

estimate which indicated that damages to the class totalled approximately \$7,200 based upon plaintiff's damages and the number of members in the class ($12\text{¢} \times 60,000 = \$7,200$). Another estimate was made using assumptions which would yield the maximum amount of damages conceivable, i.e., that no customer would make any deposit in his checking account until the service charge and maintenance charge had been outstanding for at least 30 days, which placed maximum total damages at \$18,500. After the matter of damages was referred to Magistrate Schreiber pursuant to an order entered December 4, 1975, a sample survey was made which established that the actual amount of interest on service and maintenance charges paid by twelve randomly selected customers during the relevant period averaged a total of 15.3 cents for the entire period (JA 55-57).

The ultimate settlement of the action, as evidenced in the stipulation of settlement dated April 19, 1976 (JA 43-49), provided that a fund be created sufficient in amount to distribute 35 cents to each class member and that the fund be distributed by means of a computer credit entry on each class member's checking account statement. This was more than double the amount of actual damages per customer

derived from the random sample. The total size of the fund created by this settlement was \$24,984.75 (JA 117).

In order to facilitate distribution, and as a matter of administrative convenience, it was provided that the attorney's fee would be fixed by the court later and would be paid separately by defendant rather than directly out of the fund. An alternative method, which would have involved fixing the amount of damages, then reducing the fund by the amount of attorney's fees and distributing the remainder of the fund to customers, was rejected. This would have delayed distribution of the fund and would have been unworkable since it would probably have yielded a much smaller and fractional amount to be distributed to each customer. The decision to distribute 35 cents per class member and to allow attorney's fees in addition also conformed with the court's earlier decision that attorney's fees be based upon the fund established by the damage calculation (JA 30). Accordingly, the stipulation of settlement provided as follows:

(a) Chase agrees to credit thirty-five cents (35¢) to the cash reserve special checking account of each Authorized Recipient on the Distribution Date.

(b) Chase agrees to pay, subject to the approval of the Court, as attorney's fee to Sheldon V. Burman, Esq., attorney for plaintiff and the Class, in such amount as shall be allowed by the Court in order that

the Authorized Recipients may obtain the aforesaid credit to their accounts without being required to contribute, as would be normal, a pro-rata share from the fund so created as attorney's fees and expenses. (JA 47)

Only after the stipulation of settlement was signed and submitted to the court did plaintiff reveal that he would seek approximately \$135,000 in attorney's fees -- an amount equal to more than five times the damage recovery. This was the first indication that the fee application would be disproportionate to the amount of damages recovered.

Prior to making an application for the award of attorney's fees, plaintiff served upon defendant a demand for answers to interrogatories and notice to produce requesting inter alia information and documents pertaining to the amount and manner of calculating defendant's legal expenses including details as to the identity, status, experience, participation and billing rates of all lawyers and para-professionals involved in the defense of the action (JA 39-41). Defendant served upon plaintiff its objections to interrogatories (JA 71) and response to request for the production and inspection of documents (JA 69) objecting to those interrogatories and requests to produce pertaining to the amount and manner of calculating defendant's legal expenses on the ground that such matter was not relevant to

any issue in the action and was protected by the attorney-client privilege. Defendant also served upon plaintiff its answers to interrogatories (JA 72-74) in respect of those interrogatories to which no objection was interposed and indicated in its response to request for the production and inspection of documents (JA 69) that no documents responsive to the requests to produce made in connection with such interrogatories could be found. Plaintiff moved to compel defendant to answer the interrogatories and produce the documents to which objection had been made (JA 75-76). After submission of memoranda by both sides and oral argument, the court below denied the motion in an endorsed order dated June 17, 1976 (JA 116).

Plaintiff thereafter moved on July 13, 1976 for an order setting legal fees for counsel for plaintiff in the amount of \$132,112.50 (JA 85-86) and submitted affidavits from Sheldon V. Burman sworn to June 30, 1976 (JA 87-108) and from Sanders Chaise sworn to June 29, 1976 (JA 109-115) as well as memoranda of law. Defendant submitted opposing memoranda of law. In an order entered November 5, 1976, the court below granted plaintiff's application for legal fees in the amount of \$12,500 (JA 119).

ARGUMENT

I

THE ATTORNEY'S FEE AWARDED
TO PLAINTIFF WAS FAIR AND ADEQUATE
AND PROPER IN AMOUNT

On plaintiff's motion supported by the affidavits of counsel and an accountant, and after the submission of memoranda of law by both sides, the court below awarded attorney's fees of \$12,500. On the basis of the material provided by plaintiff in connection with the application and considering the size of the class recovery, such an award was fair and adequate and proper in amount under the applicable authorities and standards.

A. The authority to award attorney's fees

The general rule in the United States is that a party to a lawsuit is not entitled to recover attorney's fees, Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). There are however certain recognized exceptions to this long standing prohibition. An allowance will be made when the losing party has acted in bad faith or in wilful disobedience of a court order, F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974), Vaughan v.

Atkinson, 369 U.S. 527 (1962), Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923). An allowance will also be made when permitted or mandated or by statute, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260 n.33 - 261 n.34 (1975). In addition, there may be an award of attorney's fees pursuant to a pre-existing agreement between the parties, Fowler v. Equitable Trust Co., 141 U.S. 411 (1891), Memphis & Little Rock Railroad v. Dow, 120 U.S. 287 (1887). Finally, a court in the exercise of its inherent equitable power may award attorney's fees when a fund has been created in which others beside plaintiff will share, Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), Trustees v. Greenough, 105 U.S. 527 (1881).

The application of plaintiff for attorney's fees in this action is premised upon the common fund exception. As the court below stated in its opinion and order entered June 14, 1974: "Once damages are calculated there will be a common fund from which to pay attorney's fees. See Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). At that time a determination may be made as to the proper amount to be awarded" (JA 30). This was also the basis for the award of attorney's fees that was contemplated by the parties in paragraph 2(b) of the stipulation of settlement when as a

matter of administrative convenience and economy it was decided that attorney's fees would be paid separately but still in an amount to be determined by the court: "Chase agrees to pay, subject to the approval of the Court, an attorney's fee to Sheldon V. Burman, Esq., attorney for plaintiff and the Class, in such amount as shall be allowed by the Court in order that the Authorized Recipients may obtain the aforesaid credit to their accounts without being required to contribute, as would be normal, a pro-rata share from the fund so created as attorney's fees and expenses" (JA 47). Plaintiff agrees that the common fund doctrine provides the authority for an award of attorney's fees in this action but disagrees with the manner in which the court below applied the theory (Br.* 15-17).

B. The general standards and principles involved in an award of attorney's fees

The leading case on the award of attorney's fees is City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974). Grinnell requires that "[t]he starting point of every fee award . . . must be a calculation of the attorney's services in terms of the time he has expended in

* "Br." refers to Appellant's Brief

the case," 495 F.2d at 470. Once the number of hours is established, the court "must attempt to value that time," 495 F.2d at 471. The time spent is then multiplied by an hourly rate selected. "[T]his simple mathematical exercise is the only legitimate starting point for analysis," *id.* After that is done, "other, less objective factors, can be introduced into the calculus," *id.*

The expressed intention of this Court in Grinnell, 495 F.2d at 469, was to introduce moderation in the award of attorney's fees:

Unfortunately, there has been more than a little justification for the dissatisfaction of the lay community with the application of the equitable fund doctrine under Rule 23. Criticism has been rampant even within the judiciary. In *Illinois v. Harper & Row Publishers*, 55 F.R.D. 221 (N.D.Ill. 1972), the District Court observed that:

If Rule 23 is to be preserved against deserved criticism, some attempt must be made by the court to suit the award of the fees to the performance of the individual counsel in light of the size of the settlement. Otherwise, the attorneys who are taking advantage of class actions to obtain lucrative fees will find themselves vulnerable to the criticism expressed in the Italian proverb, "A lawsuit is a fruit tree planted in a lawyer's garden."

55 F.R.D., at 224. (Emphasis supplied).

In a similar vein the United States District Court for the Southern District of New York pointed out: "[I]t [the Rule 23 class action] has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees." *Free World*

Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 30 (S.D.N.Y.1972). Finally, dissenting in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (Eisen II), then Chief Judge Lumbard wrote: "Obviously the only persons to gain from a class suit are not the potential plaintiffs, but the attorneys who will represent them." 391 F.2d at 571.

For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding "windfall fees" and that they should likewise avoid every appearance of having done so.

The district courts of this circuit have been mindful of Grinnell since it was decided and have acknowledged their obligation to comply with this Court's instruction to be moderate and reasonable in the award of attorney's fees, Barnett v. Pritzker, 75 Civ. 2035 (LFM) (S.D.N.Y. Jan. 13, 1977) (unreported), Barr v. WUI/TAS, 1976-1 CCH Trade Cas. ¶60,725 (S.D.N.Y. Feb. 5, 1976). Plaintiff applied to the court below for attorney's fees of \$132,112.50 (JA 85), an amount more than five times the fund created as a result of the settlement of this litigation (JA 117). In the exercise of discretion and in conformity with Grinnell, Judge Duffy was justified in refusing to grant this excessive and unseemly request and allowing instead an award in an amount which was still one-half the size of the fund.

C. The calculation of the time spent by plaintiff's counsel on the case.

As Grinnell states, the starting point of any fee award must be the hours spent by plaintiff's counsel on the case. Plaintiff claims that his counsel spent 482.25 hours in the prosecution of this action. These hours are set forth in the Burman affidavit (JA 96, 104-108) and are summarized in plaintiff's brief (Br. 9-10). This statement of services indicates on its face that an award was sought on the basis of many hours which are not compensable as a matter of law and require no rebutting evidence to disallow.

There can be no award of attorney's fees based upon time spent in the pursuit of unsuccessful claims. In Michelman v. Clark-Schwebel Fiber Glass Corp., 1975-2 CCH Trade Cas. ¶60,551, at 67,414 (S.D.N.Y. Sept. 9, 1975), rev'd on other grounds, 534 F.2d 1036 (2d Cir. 1976), the court held: "Attorneys seeking fee awards cannot be compensated for work on claims for which there was no recovery." In re Penn Central Securities Litigation, 416 F.Supp. 907, 917 (E.D.Pa. 1976), the court held: "Since nothing was recovered on this issue, which was essentially a distinct and separate claim, we do not think counsel are entitled to seek compensation from a fund which was produced for the benefit of a different class of plaintiffs." See

also FLM Collision Parts v. Ford Motor Co., 411 F.Supp. 627 (S.D.N.Y.), aff'd in part and rev'd in part on other grounds, 543 F.2d 1019 (2d Cir. 1976), Morrissey v. Curran, 386 F.Supp. 167 (S.D.N.Y. 1974). Plaintiff claimed 172.25 hours were spent through the summary judgment motion when plaintiff's cause of action based on the alleged illegal compounding of interest was dismissed (Br. 9-10; JA 96). Plaintiff's pursuit of this unsuccessful theory of liability rendered no benefit to the class although it did increase the time charges of plaintiff's counsel. Defendant should not be required to pay for the prosecution against it of non-meritorious claims. One-half of these 172.25 hours therefore were not allowable.

In Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 111 (3d Cir. 1976) (Lindy II), the court ruled: "Services performed in connection with the fee application are necessary to the attorney's recovery. They benefit him, for without them the attorney cannot, since Lindy I, recover. But such services do not benefit the fund - they do not create, increase, protect or preserve it. . . . There being no benefit to the fund from services performed by appellees in connection with their fee application, there should be no attorneys' fee

award from the fund for those services" [emphasis in original]. In re Penn Central Securities Litigation, supra, at 918, the court declared: "Another category of time which we will eliminate is that involved in the preparation of fee petitions and attendance at the fee hearing. As we explained in Dorfman, supra, 70 F.R.D. 366 at 374, these efforts are not ones which enure to the benefit of the class." See also Michelman v. Clark-Schwebel Fiber Glass Corp., supra, at 67,414, where hours for "Fee application/Taxation of Costs" were excluded along with those categorized as "Not billable." Plaintiff claimed 38.5 hours were spent on the legal fee application (Br. 10; JA 96). This time was of no benefit to the class, particularly since pursuant to paragraph 2(a) of the stipulation of settlement, the recovery was unaffected by the disposition of the request for attorney's fees (JA 47). In addition, according to the schedule annexed to the Burman affidavit, 12.75 hours of the 38.5 hours involved in the legal fee application were spent in the preparation of plaintiff's demand for answers to interrogatories and notice to produce and the unsuccessful motion brought to compel disclosure of the information sought (JA 107-108). The class was not benefited by time spent in the preparation and pursuit of

interrogatories purportedly filed to aid in the legal fee application, particularly where the interrogatories were irrelevant and objectionable (Point II infra).

In Grinnell this Court explained that, "Valuation obviously requires some fairly definite information as to the way in which that time was spent (discovery, oral argument, negotiation, etc.) and by whom (senior partners, junior partners or associates)," 495 F.2d at 471. The petitioner in Grinnell did not provide a detailed breakdown of the time claimed. This Court noted, "It is conceivable that large amounts of time could have been spent on comparatively routine matters or in ministerial duties," 495 F.2d at 473. So too in the application for attorney's fees made by plaintiff below there was incomplete and inadequate explanation for many of the hours for which compensation was sought. In item 50 of the schedule annexed to the Burman affidavit, 66 hours were claimed for approximately 400 oral and written communications (JA 108). This was the single largest amount of time claimed spent in prosecuting this action and yet the least description was provided. There was no way to determine the accuracy or reasonableness of the hours stated or whether the communications in any way contribute to efforts which ultimately resulted in recovery

for the class. In item 50 of the same schedule (JA 108), 35.25 miscellaneous and completely unexplained hours were claimed. No information was provided as to what was supposed to have been accomplished during this time or why it was estimated at 8% of the items previously listed. In Arenson v. Board of Trade, 372 F.Supp. 1349, 1355 nn. 6-7 (N.D.Ill. 1974), the court disallowed the "sum of 155 hours which was classified as an estimate of miscellaneous additional time spent on the instant litigation" and the "sum of 38-1/2 hours which was unrecorded time spent on correspondence." So too here and for the same reasons, items 50 and 51 were not allowable. Finally, in item 52 of the schedule (JA 108), 10 hours were claimed which had admittedly not been expended by plaintiff's counsel but which were estimated to be required for the termination of the litigation. Such hours were objectionable both because they were insufficiently explained and because they necessarily related to matters involving the attorney's fee application, which was not compensable time.

Based upon the foregoing review of the hours claimed, 235.75 hours were not compensable as a matter of law, representing time spent on claims for which there was no recovery for the class (86), time spent on the legal fee

application (38.5), hours claimed for which insufficient explanation was provided (101.25), and estimated time to be spent on the legal fee application (10). This left a remainder of only 246.5 hours.

D. The valuation of the time spent by counsel for plaintiff on the case.

Grinnell provides that once the number of hours expended on the case has been established, the court must then value that time. In Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973) (Lindy I), the court stated: "The value of an attorney's time generally is reflected in his normal billing rate." This language was quoted with approval in Grinnell, 495 F.2d at 473. Grinnell also provides that once the information on hours is obtained, "the easiest way for the court to compute value is to multiply the number of hours that each lawyer worked on the case by the hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation," 495 F.2d at 471.

Plaintiff requested that attorney's fees be awarded at the base rate of \$150 an hour. No showing was made that this was plaintiff's counsel's normal billing rate on non-

contingent matters or that this was the hourly rate of attorneys of like skill in the area. Rather, the bare assertion was made in paragraph 37 of the Burman affidavit that senior attorneys representing defendants in class actions would receive at least \$150 (JA 97-98).

Since counsel for plaintiff did not reveal his normal billing rate on non-contingent matters, it was for the court below to determine what attorneys of skill comparable to that of plaintiff's counsel and doing work comparable to that of plaintiff's counsel would earn. The court below was aware of the range of fees charged in this area by lawyers of varying experience and specialization. It was uniquely familiar with the quality of plaintiff's counsel's work and the level of difficulty and importance of the case. It was therefore in the best position to value his hours and set an appropriate attorney's fee. "The trial court's appraisal of the quality and value of legal services will ordinarily not be disturbed," Oppenlander v. Standard Oil Co., 64 F.R.D. 597, 614 (D.Colo. 1974), and cases cited there.

The award of \$12,500 to counsel for plaintiff reflects a rate of approximately \$53 an hour on the basis of 235.75 allowable and compensable hours. Defendant suggested

to the court below that for purposes of the initial Grinnell computation an hourly rate of no more than \$75 should be allowed and that in light of the size of the recovery an hourly rate of \$50 would be justifiable (R.* 51; cf. Br. 21). Particularly because the recovery obtained amounted to only 35¢ for each class member, the court below determined that an amount of \$12,500 was generous (JA 119). This was well within its discretion. Certainly, plaintiff's counsel is not automatically entitled to a premium base rate of \$150 because his fee is set by the court rather than by the marketplace.

Since Grinnell, the district courts of this circuit have attempted to be moderate and restrained in setting base rates for the award of attorney's fees. In Blank v. Talley Industries, 390 F.Supp. 1 (S.D.N.Y. 1975), Judge Weinfeld concluded that \$100 per hour for partners' time and \$50 per hour for associates' time was fair and reasonable in a securities fraud class action where the total class recovery was \$10,500,000. In Stull v. Baker, 69 Civ. 2046 (WCC) (S.D.N.Y. Feb. 27, 1976) (unreported), Judge Conner awarded

* "R." refers to the Record on Appeal

attorney's fees at the base rate of \$75 per hour on a total class recovery of \$2,000,000.

Also since Grinnell, the district courts of this circuit have attempted to maintain a reasonable relationship between the base rates and attorney's fees they set and the fund created. The following representative list shows the recovery obtained, the attorney's fees awarded, and the proportion the fees bear to the recovery:

	<u>Recovery (\$)</u>	<u>Fees (\$)</u>	<u>%</u>
<u>Gilman v. Mohawk Data Sciences Corp.</u> , 71 Civ. 4742 (CMM) (S.D.N.Y. May 3, 1976) (unreported)	4,325,000	534,345	12
<u>Blank v. Talley Industries</u> , 390 F.Supp 1 (S.D.N.Y. 1975)	10,500,000	1,395,600	13
<u>Lewis v. Chapman</u> , 73 Civ. 4029 (S.D.N.Y. Feb. 10, 1977) (unreported)	2,000,000	275,000	14
<u>FLM Collision Parts v. Ford Motor Co.</u> , 1976 CCH Trade Cas. ¶60,784 (S.D.N.Y. March 17, 1976)	874,506	135,000	15
<u>Stull v. Baker</u> , 69 Civ. 2046 (WCC) (S.D.N.Y. Feb. 27, 1976) (unreported)	2,000,000	300,000	15

<u>Benerofe v. Bartlett,</u> ['75-'76 Transfer Binder] CCH Fed.Sec.L.Rep. ¶95,260 (S.D.N.Y. July 30, 1975)	2,850,000	452,073	17
<u>Bonime v. Doyle,</u> 416 F.Supp. 1372 (S.D.N.Y. 1976)	1,350,000	260,000	19
<u>Michelman v. Clark-Schwebel</u> <u>Fiber Glass Corp.,</u> 1975-2 CCH Trade Cas. ¶60,551 (S.D.N.Y. Sept. 9, 1975)	1,594,851	325,000	22
<u>Federman v. Empire Fire and</u> <u>Marine Ins. Co.,</u> ['75-'76 Transfer Binder] CCH Fed.Sec. L.Rep. ¶95,418 (S.D.N.Y. Jan. 19, 1976)	785,000	178,587	23
<u>Barr v. WUI/TAS,</u> 1976-1 CCH Trade Cas. ¶60,725 (S.D.N.Y. Feb. 5, 1976)	315,910	78,500	25
<u>Bandel v. Gold,</u> 72 Civ. 3901 (DBB) (S.D.N.Y. Feb. 3, 1976) (unreported)	169,000	42,000	25

As the Court noted in Stull v. Baker, supra, at 28:

"Measuring the facts of this case against the criteria outlined in cases such as City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974) and Alpine Pharmacy v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir. 1973), a fee of \$300,000 bears a reasonable relationship to the \$2,000,000 Settlement Fund." Thus, while avoiding the percentage method of awarding attorney's fees which was used

prior to Grinnell, the courts have nevertheless acted to maintain a reasonable relationship between the base rates set and fees awarded and the amount of the recovery obtained. It distorts the rationale of the class action device and brings the Bar into disrepute when attorneys profit more from litigation than the clients they purport to serve. Certainly there is no precedent for the request made by plaintiff below for an award of attorney's fees based on a premium rate of \$150 per hour and amounting to more than five times the total class recovery.

The requirement of reasonableness is the same whether the attorney's fees are paid directly out of the common fund, as is usual, or separately by defendant, as is the case here. In Grunin v. International House of Pancakes, 513 F.2d 114, 128 (8th Cir.), cert. denied, 423 U.S. 864 (1975), the court declared:

The argument that a lesser standard should apply for purposes of the allocation of fees merely because the attorneys have had the foresight to provide for themselves in the agreement is equally unavailing. At some point the discretion of the court must be exercised in determining what portion of the \$1.25 million is "fair, reasonable and adequate."

And in Barnett v. Pritzker, 75 Civ. 2035 (LFM) (S.D.N.Y. Jan. 13, 1977) (unreported), the court held, at 5:

We are mindful that defendant GL Corporation has agreed to pay counsel fees in the class actions in such

fair and reasonable amount as determined by the court and that, therefore, our award of fees will not directly reduce the settlement fund. The parties here have wisely left determination of the amount of the fees to the court, thereby invoking the exercise of our discretionary powers to make such an award as equity and justice require, applying the same standards as if the fees were to be paid from the fund.

In light of Grinnell's instruction to be moderate and to require a detailed accounting of hours, and considering the small recovery obtained in this action and the need to maintain a reasonable relationship between attorney's fees and the size of the recovery, it cannot be said that the court below abused its discretion in awarding \$17,500, which represents a rate of approximately \$53 an hour for 246.5 allowable and compensable hours spent on behalf of the class.

E. The other factors to be considered in the determination of an appropriate award of attorney's fees.

Grinnell provides that once the number of hours is established and a valuation is made, then, "other, less objective factors, can be introduced into the calculus," 495 F.2d at 471. The award may be increased for exceedingly good and successful work or may be decreased if the court deems that appropriate. As the Third Circuit held in Lindy I, 487 F.2d at 168: "In making allowance for the quality of work, the court must keep in mind that the attorney will

receive an otherwise reasonable compensation for his time under the figure arrived at from the hourly rate. Any increase or decrease in fees to adjust for the quality of work is designed to take account of an unusual degree of skill, be it unusually poor or unusually good." As this Court noted in Grinnell, the multiplication of allowable hours by rate of compensation "is the only legitimate starting point for analysis," 495 F.2d at 471, and does not constitute a minimum fee that can only be increased (Br. 19, 27).

In addition to suggesting that an hourly rate of \$150 be used, plaintiff requested the court below to apply a multiple of two to most of the time for which compensation was claimed (JA 102). Such multiples have been awarded for outstanding success but are not automatic and must be justified by the particular circumstances of the litigation.

1. The quality of work here does not merit an increase in the award

In this action, no multiple was deserved since the recovery was negligible and was based on a theory of liability developed by the court below and not by plaintiff's counsel.

On defendant's motion for summary judgment and plaintiff's cross-motion for partial summary judgment,

plaintiff's claim that defendant had illegally compounded interest was dismissed while plaintiff's claim that defendant had illegally imposed interest on check service charges and maintenance charges was sustained, but on grounds other than those urged by plaintiff's counsel. In respect of the latter claim, plaintiff's counsel had argued that interest should not be computed on funds advanced to pay service charges and maintenance charges because the amounts had not been separately authorized and could not be "loans" within the meaning of Section 108(5)(a) of the New York Banking Law. Defendant took the position that such amounts were "loans" within the meaning of the statute.

The court granted summary judgment in favor of plaintiff but on the basis of the first exception contained in Section 108(5)(e) and not on the basis of the argument made by plaintiff's counsel (JA 17-22). In fact, the reference in plaintiff's papers to Section 108(5)(e) states that the exceptions are "not relevant to this action" (R. 20). Under these particular circumstances, the application of a multiple would have been inappropriate.

2. The issuance of an injunction here does not merit an increase in the award

Recognizing that the modest \$25,000 recovery obtained for the class does not justify the exorbitant fee

of \$132,112.50 requested below, plaintiff argues that additional credit be given and the fee augmented because the court enjoined the challenged practice of imposing interest on check service charges and maintenance charges. In aid of this claim, plaintiff submitted to the court below the Chaise affidavit, which purported to show that as a result of such injunctive relief the total class recovery was in actuality \$425,604.50 and that the \$132,112.50 request for attorney's fees amounted to only 32% of that (Br. 11; JA 109-115).*

* Even were plaintiff's counsel entitled to attorney's fees for benefits allegedly accruing to the class as a result of injunctive relief, the calculation submitted to the court below did not accurately reflect present value for such benefits.

The figures for pre-judgment benefits and post-judgment benefits were arrived at through various manipulations of the then estimated \$25,200 cash fund. Yet \$25,200 was not the amount of the actual injury suffered by the class as a result of the practices enjoined. Rather, the actual injury suffered by the class during the subject thirty-five month period amounted to only about \$9,000 (JA 57). Any computation of benefit accruing to the class as a result of the cessation of objectionable practices should have been based on projections of this \$9,000 sum.

The figures for pre-judgment benefits and post-judgment benefits also included alleged savings realized as a result of defendant abandoning the compounding practice. Yet plaintiff's claim that defendant was illegally charging interest on interest was dismissed by the court.

The figures for pre-judgment benefits and post-judgment benefits were augmented by the application of

(continued next page)

Subsequent to the decision granting an injunction, the court below established as the law of the case that attorney's fees were to be awarded on the basis of damages alone and not on the basis of other perceived benefits of the action: "Once damages are calculated there will be a common fund from which to pay attorney's fees. See Sprague v. Ticonic National Bank, 307 U.S. 161 (1939)," (JA 30). Obviously, the court never contemplated that the requested

(continued from preceding page)

an 8% "growth factor". There was no explanation of why that number was chosen or why it should reasonably have been believed that that rate of growth would be maintained through June 1986.

The figures for pre-judgment benefits and post-judgment benefits were also augmented by the application of a 5% "interest" charge on the annual benefit. Again there was no explanation of why that number was chosen or why it should reasonably have been believed that interest might be assessed over the following ten years.

The figures for post-judgment benefits were based on the assumption that defendant would continue to impose check service charges of \$1.20 per month and monthly maintenance charges of \$0.75 per month. Rapid change in the retail banking industry and the advent of free checking make that assumption untenable.

In the calculation of total benefits there was included \$132,112.50 for attorney's fees. Using this bootstrap argument, plaintiff in effect argued that he was entitled to large attorney's fees because of the large benefits obtained for the class. But those benefits were in turn inflated by including the requested unreasonably large fee request as a benefit.

Finally, there was no explanation of the meaning of "estimated notice costs", how that figure was obtained, or why it should be considered a benefit to the class.

attorney's fee would amount to more than five times the common fund.

Plaintiff cites Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), Hall v. Cole, 412 U.S. 1 (1973) (Br. 18), Merola v. Atlantic Richfield Co., 493 F.2d 292 (3d Cir. 1974) (Merola I), 515 F.2d 165 (3d Cir. 1975) (Merola II) (Br. 23-26), Arenson V. Board of Trade, 372 F.Supp. 1349 (N.D. Ill 1974) (Br. 28); and Acker v. Provident National Bank, 512 F.2d 729 (3d Cir. 1975) (Br. 30-31) for the proposition that he is entitled to attorney's fees based upon the injunctive relief obtained, over and above those fees to be awarded based upon the damages recovered. These cases do not support such a theory and are readily distinguishable.

Mills v. Electric Auto-Lite was a derivative and class action brought by the shareholders of defendant Electric Auto-Lite challenging a merger that had been accomplished through the use of an allegedly misleading proxy statement and asking that the merger be set aside. The court ruled that the petitioners were entitled to an interim award of attorney's fees "on the theory that the corporation which has received the benefit of the attorney's services should pay the reasonable value thereof," 396 U.S. at 390, quoting from Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir. 1943). The Court went on in its opinion to

emphasize that the basis of its decision to allow attorney's fees was the derivative nature of the action:

This development [to permit reimbursement in cases where the litigation has conferred a substantial benefit on members of an ascertainable class] has been most pronounced in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor. [Footnote omitted] 396 U.S. at 394

Again, in Hall v. Cole it was the derivative nature of plaintiff's action that persuaded the Court that the award of attorney's fees was justified although there was no fund created. In upholding the award of attorney's fees against the union for improperly expelling plaintiff, the Court declared:

Viewed in this context, there can be no doubt that, by vindicating his own right of free speech guaranteed by §101(a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. . . . Thus, as in Mills, reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to "the class that has benefited from them and that would have had to pay them had it brought the suit." Mills v. Electric Auto-Lite Co., supra, at 397. [Footnote omitted] 412 U.S. at 8-9

The instant action in contrast is not derivative in nature and the rationale of Mills v. Electric Auto-Lite and Hall v. Cole does not justify the assessment of attorney's

fees against defendant based upon the injunctive relief obtained. This case is more closely analogous to Grace v. Ludwig, 484 F.2d 1262 (2d Cir. 1973), cert. denied, 416 U.S. 905 (1974), where this Court sustained the district court's dismissal of an action brought for attorney's fees and expenses because it found no benefit was bestowed on the defendants whom plaintiffs sought to charge.

Merola v. Atlantic Richfield Co. was a private antitrust action filed on behalf of all present and former Atlantic Richfield gasoline station dealers in the Pittsburgh area alleging that defendant had restrained trade through various means including threats of lease cancellation and non-renewal. Prior to class action determination two settlements were agreed upon by the parties. The named plaintiffs received \$10,000 for the early surrender of their lease, and in exchange for the dismissal of the action with respect to the purported class defendant agreed to certain changes in its leasing policies. Also as part of the settlement, "[i]t was agreed that . . . the defendant would be liable for attorneys' fees, expenses and costs . . . [to] be determined by the Court. . . ." 515 F.2d at 167. It was on the basis of this agreement rather than on the basis of the common fund doctrine that attorneys' fees were awarded. As the court stated in Merola II, "Counsel have not suggested any basis for the award of

attorneys' fees in this case other than the agreement between the parties at the time of settlement," 515 F.2d at 173.

Merola v. Atlantic Richfield Co. therefore fits into the contract exception to the general rule against the award of attorney's fees, Fowler v. Equitable Trust Co., supra, Memphis & Little Rock Railroad v. Dow, supra, and allowances made thereunder are not tied to the creation of a common fund and need not bear a reasonable relationship to such fund. When the defendant agreed to the payment of attorney's fees in Merola v. Atlantic Richfield Co., it knew and agreed that the only relief involved was injunctive and it was with this understanding that the parties purposefully empowered to the court to determine an appropriate attorney's fee in light of the terms of the settlement.

In contrast, the present action fits into the common fund exception to the general rule against the award of attorney's fees, Sprague v. Ticonic National Bank, supra, Trustees v. Greenough, supra, and allowances made thereunder depend upon the creation of a common fund and must bear a reasonable relationship to such fund. There was no agreement here by defendant to pay attorney's fees, let alone attorney's fees based upon the projected value of injunctive relief. Rather, attorney's fees were assessed by the court below in the exercise of its equitable power.

Paragraph 2(b) of the stipulation of settlement did provide that attorney's fees would be paid separate from the fund in such amount as the court would determine (JA 47). This provision however was certainly not a contract within the meaning of the contract exception to the general rule against the award of attorney's fees, Fowler v. Equitable Trust Co., supra, Memphis & Little Rock Railroad v. Dow, supra. Rather, it was a simple procedural device intended to facilitate distribution of the common fund and was not intended to create a new and independent contractual obligation to pay attorney's fees in an amount unconnected with the size of the recovery. When such an arrangement is made as a matter of administrative convenience it does not alter the standards and limitations connected with the award of attorneys fees under the common fund doctrine. In this connection, it is again worth quoting Grunin v. International House of Pancakes, supra, at 128, where the court declared:

The argument that a lesser standard should apply for purposes of the allocation of fees merely because the attorneys have had the foresight to provide for themselves in the agreement is equally unavailing. At some point the discretion of the court must be exercised in determining what portion of the \$1.25 million is "fair, reasonable and adequate."

Also Barnett v. Pritzker, supra, at 5, where the court held:

We are mindful that defendant GL Corporation has agreed to pay counsel fees in the class actions in such

fair and reasonable amount as determined by the court and that, therefore, our award of fees will not directly reduce the settlement fund. The parties here have wisely left determination of the amount of the fees to the court, thereby invoking the exercise of our discretionary powers to make such an award as equity and justice require, applying the same standards as if the fees were to be paid from the fund.

Plaintiff's reliance on Arenson v. Board of Trade is also misplaced. This was a private antitrust action which attacked the fixed commission rates of commodities exchanges on behalf of a class of 400,000 public customers. The court noted: "As far as the social effect of this litigation, it is clear that this litigation is one of the most significant pieces of litigation pending in the Northern District of Illinois, if not the United States," 372 F.Supp. at 1352. It was settled prior to any decision on the merits with the parties agreeing that defendants would pay reasonable attorneys' fees to plaintiffs' attorneys. Although the court referred to its equitable power as authority to award attorneys' fees, it also premised its action upon the agreement of the parties and the immensity of the benefit. In response to defendants' argument based on Trans World Airline v. Hughes, 312 F.Supp. 478 (S.D.N.Y. 1970), that time spent on obtaining equitable relief could not be compensated under Section 4 of the Clayton Act, the court stated: "The plaintiffs have obtained an injunction to stop the evil conduct and there is a multi-million dollar benefit to the plaintiff class. In

light of the beneficial result achieved and in light of the fact that the defendants agreed to pay the fees of plaintiffs' attorneys without any reference to Section 4, it is clear that the defendants' contention is without merit" [emphasis added], 372 F.Supp. at 1356 n. 13.

Arenson v. Board of Trade therefore does not provide a foundation for plaintiff's suggestion that the court may make an award pursuant to the common fund doctrine even when there is no common fund. Neither does it support plaintiff's contention that when equitable relief is granted together with the establishment of a common fund, an award may be made that bears no reasonable relation to the size of such fund and may even exceed it five-fold.

As to Acker v. Provident National Bank, the order of the district court entered September 15, 1975, a copy of which is annexed hereto as Appendix A, clearly states in paragraph 6:

The defendants do not urge that the recent Supreme Court decision in Alyeska Pipeline Serv. v. Wilderness Soc., 44 L. Ed. 2d 141 (1975), bars an award of counsel fees under the circumstances and this Court accordingly need not decide whether an award of counsel fees is precluded by that decision.

The decision in Alyeska Pipeline Service Co. v. Wilderness Society, however, arrested the tendency of some federal courts to fashion new theories for awarding attorney's fees to plaintiffs involved in class action litigation. Though not pressed in Acker v. Provident

National Bank, this decision may not be ignored here. (A more extensive discussion of Alyeska Pipeline Service Co. v. Wilderness Society is set forth below.) It should also be noted that in paragraph 7 of its order in Acker v. Provident National Bank the district court observed:

In determining the reasonableness of the counsel fees to be awarded, this Court has been aided by the willingness of opposing counsel to stipulate to the appropriate monetary values necessary to apply the calculations mandated by Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) and Merola v. Atlantic Richfield Co., supra. . . .

Such agreement was certainly absent here.

In the instant case there was a recovery of damages for the class and those damages comprise the common fund against which attorney's fees must be considered. Plaintiff does not direct this Court's attention to any case in which a common fund was established and where the attorney for the class was given additional credit for any related equitable relief obtained. When there is a common fund, that becomes the touchstone for computing compensation. If no common fund at all is created, attorney's fees are available only if authorized by statute or contract, Merola v. Atlantic Richfield, Arenson v. Board of Trade, or if the plaintiff has derivatively obtained some benefit for the party against whom assessment is sought, Mills v. Electric Auto-Lite, Hall v. Cole. Here, plaintiff's counsel's best efforts resulted in a damage award of approximately \$25,000 and it is in

relation to the common fund thereby created that an application for attorney's fees must be evaluated.

F. The private attorney general theory and access to the courts

The private attorney general approach to the award of attorney's fees was disallowed by the Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). In that case, the Wilderness Society and certain other environmental groups which had brought suit to prevent the Secretary of the Interior from issuing permits necessary for the construction of the Alaska pipeline were awarded attorneys' fees although their action was mooted when Congress enacted legislation which effectively terminated the merits of the litigation. The Supreme Court reversed the award and held that if there was to be a "private attorney general" exception to the general American rule with respect to the allowance of attorney's fees, it would have to be created by Congress and not the courts:

Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limit of 28 U.S.C. §1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases. Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private-attorney-general approach when such judicial rule will operate only against private parties and not

against the Government. [footnote omitted] [emphasis added] 421 U.S. at 269

As Judge Conner observed in Stull v. Baker, supra, p. 28 n. 5 in the course of his review of the question of counsel fees in class action litigation:

At one point, the courts began carving out another exception to the traditional American rule against awarding attorneys' fees. This exception, which is, in part, relied upon by plaintiffs' counsel, ran in favor of plaintiffs, denominated "private attorneys general," who had rendered a substantial service to the public by effectuating a particular congressional policy. The Supreme Court, however, in an extensive review of the background and theory behind permitting a litigant to recover attorneys' fees, has declared that this practice is impermissible. Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975).

It is clear, therefore, that plaintiff's counsel cannot base his request for attorney's fees on the theory that he acted as a private attorney general.

At one point plaintiff acknowledges that Alyeska foreclosed the private attorney general theory as a basis for the award of attorney's fees (Br. 16) but then proceeds to argue as though the theory were still viable.

Rosenfeld v. Black, 56 F.R.D. 604 (S.D.N.Y. 1972), is cited for the proposition that courts should be generous in fee awards in order to encourage actions to prevent corporate wrongdoing (Br. 32). Rosenfeld was decided before Grinnell and Alyeska and for that reason premises the award upon a percentage of the recovery and the theory of the private attorney general.

Grace v. Ludwig, supra, is cited for the proposition that courts should be generous in fee awards in order to encourage corporate therapeutics (Br. 32). Grace too was decided before Grinnell and Alyeska and although it referred in dicta to the theory of the private attorney general, it held that the attorneys in that case were not entitled to any award and the complaint was dismissed.

Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976), is cited for the proposition that an award of legal fees should furnish full recompense for the value of services rendered in litigation to enforce statutory rights and that a reduction in amount was not mandated because the class was represented by a publicly financed legal services organization (Br. 32-33). But cf., Equal Employment Opportunity Commission v. Enterprise Association Steamfitters, 542 F.2d 579 (2d Cir. 1976). Torres was a civil rights action for equitable relief in which attorney's fees were authorized by statute without regard or need for a monetary recovery. It does not free plaintiff in this suit from the historic limitations on awards under the common fund doctrine and the requirement of reasonable relationship to the size of the monetary recovery.

Ratner v. Chemical Bank, 54 F.R.D. 412 (S.D.N.Y. 1972), another case cited by plaintiff involving a public interest law firm (Br. 27), requires comment. Ratner was

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not certified as a class action and no common fund was created. Attorneys fees were awarded pursuant to statute and not in the exercise of the court's equitable powers under the common fund doctrine. In addition, there was contractual underpinning for the award since it had been agreed by the parties beforehand that if plaintiff prevailed in the end, "he will be entitled to approximately \$20,000 attorney's fees as well as the minimum statutory recovery of \$100," 54 F.R.D. at 414.

Serrano v. Priest, No. C-938 254 (Super.Ct.L.A.Co.) is cited for the proposition that counsel fees may be awarded even where no damages are sought and only injunctive relief in the public interest is obtained (Br. 29-30). However, the order entered August 1, 1976 to which plaintiff refers, a copy of which is annexed hereto as Appendix B, specifically states that the awards are made "under the private attorney general doctrine. . ." Serrano v. Priest is therefore irrelevant to this case and of no assistance to plaintiff.

Plaintiff suggests that the Civil Rights Attorney's Fees Awards Act of 1976, PL 94-559, 90 Stat. 2641 overrules Alyeska in part (Br. 33-34). On the contrary, the act was passed to comply with the holding in Alyeska that only Congress and not the courts could authorize fee shifting. The purpose and effect of the act is to specifically allow

Plaintiff distorts the purpose of the class action device and encourages public cynicism by demanding attorney's fees of \$132,112.50 when each class member received only 35¢. Even the very large, complex and dissimilar antitrust cases which are cited by plaintiff to justify substantial compensation (Br. 28) caution against the excessive demands being made by class counsel: In re Gypsum Cases, 386 F.Supp. 959, 961-962 (N.D.Cal. 1974) ("While counsel are entitled to adequate attorneys' fees commensurate with the fund created and the prevention of future corporate abuse in the gypsum industry . . . they seem to have forgotten that the equity power of the court to award attorneys' fees and thus reward them as vindicators of public policy is definitely limited by the caution that such awards, though they shall not be niggardly, must be reasonable attorneys' fees, no more and no less."); Oppenlander v. Standard Oil Co., supra, at 616-617 ("Our research reflects that fee allowances in class actions brought under the federal securities laws have traditionally ranged from 20 percent (20%) to 30 percent (30%) of the recovery effected for the class. . . . Fees in that general range have been allowed, even where very large recoveries have been effected, where warranted by the circumstances of the particular case and by the magnitude and quality of counsel's legal services. . . . The fees awarded in this litigation are in the lower range

of awards in class actions involving substantial recoveries.

[citations omitted]); Doughboy Industries v. American Cyanamid, 1975-2 CCH Trade Cas. ¶60,452 at 67,028 (D.Minn. May 1, 1975) ("Through the years, various criteria have been used by different courts to determine appropriate reward. Although these criteria may at times be conflicting, all standards seem to agree that each case must turn upon its own facts and that it is up to the court to balance the various interests involved. All decisions lead to the inevitable determination that the fee should be 'reasonable.'")

G. The plaintiff's waiver of an evidentiary hearing below.

Grinnell provides that, "where there were many vigorous disputes of fact over the elements that comprised the fee award, an evidentiary hearing, complete with cross-examination, is imperative," 495 F.2d at 473. Plaintiff briefly refers to the need for an evidentiary hearing, "where factual circumstances are at issue" (Br. 26).

No hearing was needed in this case since neither party requested one and the only disagreements were as to law -- not disputes as to facts. Even accepting the Burman affidavit submitted in support of the fee application as true and accurate, it nevertheless showed on its face that hours were being claimed which were not compensable as a matter of law (JA 96, 104-108), e.g., the dismissed cause of action for allegedly illegal compounding. Even accepting

the Chaise affidavit submitted in support of the fee application as a reasonable estimate of the present value of the injunction, it nevertheless involved a theory for the augmentation of an award of attorney's fees under the common fund doctrine which was impermissible as a matter of law (JA 109-115).

In this case, plaintiff was not denied an evidentiary hearing as in Grinnell and Lindy I. Rather he knowingly and purposefully waived it. On July 13, 1976, after the stipulation of settlement had been executed and approved by the court, plaintiff moved directly for the award of \$132,112.50 attorney's fees on the basis of prior papers and proceedings and the supporting affidavits of his counsel and an accountant (JA 85-86). No request was made for an evidentiary hearing then or at any time prior to Judge Duffy's order some four months later. Even subsequent to the entry of the order, plaintiff made no application for reconsideration and the holding of an evidentiary hearing.

The expressed objective of Grinnell is to subject applications for allowances to scrutiny and analysis and to moderate attorney's fees. In this connection, the basic purpose of the evidentiary hearing is to provide objectors with a meaningful opportunity to cross-examine the applicant and to express disapproval of any amount requested. In this matter, defendant was the only objector (JA 70) and it

expressed its analysis and disapproval to the court in papers in accordance with the procedure adopted by plaintiff. Since it was defendant and not plaintiff who was the intended beneficiary of an evidentiary hearing, plaintiff was not prejudiced because one was not held. In any event, it was plaintiff who waived any right that did exist and should not now be heard to complain.

II

THE AMOUNT AND MANNER OF CALCULATING
DEFENDANT'S LEGAL EXPENSES IS NOT
RELEVANT TO A DETERMINATION OF
PLAINTIFF'S ATTORNEY'S FEE AND IS
PRIVILEGED

After the stipulation of settlement was executed but before the application for attorney's fees was made, plaintiff served upon defendant a demand for answers to interrogatories and notice to produce. On the grounds of relevance and privilege, defendant objected to those interrogatories and requests to produce which related to the amount and manner of calculating defendant's legal expenses. Plaintiff moved to compel answers and production, which motion was denied.

- A. The amount and manner of calculating defendant's legal expenses in the defense of this action is not relevant to a determination of the award of attorney's fees to counsel for plaintiff

In an application for the award of attorney's fees, the relevant issue is the value of the services rendered to the class and not the value of the services rendered to the defendant. This Court declared in Grinnell, 495 F.2d at 471: "Once the District Court ascertains the number of hours that the attorney and his firm has spent on the case, it must attempt to value that time." The Third Circuit observed in Lindy I, 487 F.2d at 167, and was quoted with approval by this Court in Grinnell, 495 F.2d at 473: "The value of an attorney's time generally is reflected in his normal billing rate." No representation was made below that counsel for plaintiff worked exclusively on a contingent basis and no showing was made below of the normal billing rate charged by counsel for plaintiff on non-contingent matters. Such information would have been germane to the calculation of plaintiff's attorney's fees but was withheld even while inquiry was made into the billing rate charged by counsel for the defendant.

As an alternative method of establishing the value of time spent on a case when counsel for plaintiff in fact does work exclusively on a contingent basis and does not have a normal billing rate to use, this Court suggested in Grinnell, 495 F.2d at 471: ". . . the hourly amount to which

attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation." Plaintiff argues, without citation to legal authority and without any factual demonstration of comparability, that the hourly rate to be assigned "could best be obtained by reviewing the legal fees paid to counsel for the Bank" (Br. 39). Far more relevant for this purpose would be an examination of the rates charged by other plaintiffs' lawyers with comparable experience and a similar practice. Plaintiff quotes a sentence from the Manual for Complex Litigation to the effect that: "In an appropriate case the Court may also require disclosure of attorney's fees paid to counsel for defendants" (Br. 38). However, there is no definition given of what constitutes an appropriate case and there is no reason given why this should be considered an appropriate case. Whatever situation may have been contemplated by the authors of the Manual, no court has ever ordered such disclosure. Rather, there have been numerous decisions in a variety of contexts that inquiry into the retainer agreements of an adverse party to a civil action is outside the proper scope of discovery.

Foremost Promotions v. Pabst Brewing Co., 15 F.R.D. 128 (N.D. Ill. 1953), was an antitrust action in which plaintiffs alleged that defendants conspired to refuse to

sell them Pabst beer in retaliation for their advertising the beer at less than list price and defendants counter-claimed that plaintiffs conspired to refuse to buy Pabst beer. At a deposition conducted by defendants, plaintiffs' counsel objected on the ground of relevance and instructed his witnesses not to answer "questions directed to the instigation of the suit, the solicitation to participate therein and arrangements concerning fees", 15 F.R.D. at 129. Defendants' motion to compel answers was denied as the court observed: "The responses might lead to embarrassing admissions of champerty or unconscionable arrangements as to fees and expenses, but these excesses are not in any way relevant to the trial of the particular issue", 15 F.R.D. at 130.

Bogosian v. Gulf Oil Corp., 337 F. Supp. 1228 (E.D.Pa. 1971), was also an antitrust action in which the plaintiff service station dealer alleged domination of retail oil markets, monopolization of service station locations and stabilization of oil product prices by the eleven defendant national oil companies. A joint deposition of plaintiff was taken by defendants on court order at which plaintiff refused to answer certain questions on advice of counsel. Defendant Shell Oil Company's motion to compel answers was denied with the court holding in part: "As to the many questions regarding the financial arrangements

between plaintiff and his counsel, they are outside the scope of the discovery provisions of the Federal Rules of Civil Procedure as they are not 'relevant to the subject matter involved in the pending action,' nor do they appear 'reasonably calculated to lead to the discovery of admissible evidence.' Rule 26(b)(1), F.R.Civ.P.; *Mills Music, Inc. v. Cromwell Music, Inc.*, 14 F.R.D. 411 (S.D.N.Y. 1953)," 337 F.Supp. at 1230.

The Mills Music case relied on by the court in Bogosian was an action for copyright infringement in which defendant counterclaimed for infringement and unfair competition. Plaintiff's attorney was deposed and refused to answer certain questions propounded by counsel for defendant. On defendant's motion to compel answers, the court noted: "Plaintiff also claims that the defendant was attempting to examine the witness about the terms of the witness' retainer agreement with his client, the plaintiff herein. I agree with plaintiff's attorney that discovery proceedings should not go that far," 14 F.R.D. at 413. But the court went on to say: "However, I read no such question in the deposition," id.

Kleinman v. Sibley, 21 F.R.Serv.2d 62 (E.D.Pa. Oct. 8, 1975), was a securities fraud class action. Plaintiff was an unsophisticated investor who was deposed and on advice of counsel refused to answer questions concerning the

factual and legal basis of the claims asserted in her complaint "as well as questions concerning her financial condition, arrangements with counsel, and previous litigation experience," 21 F.R.Serv.2d at 62. Defendant Western Union's motion to compel discovery was denied. The court indicated its disagreement with the contention that "further exploration of the individual plaintiff's knowledge, and exploration of her financial condition and her arrangements with counsel, would be helpful in determining her adequacy to represent the class," and held that such matters, "are not within the proper scope of discovery," 21 F.R.Serv.2d at 63.

So too in the instant action, defendant's retainer agreement is a matter of no relevance to the burden plaintiff must sustain in an application for the award of attorney's fees and is outside the recognized limits of disclosure. Rule 401 of the Federal Rules of Evidence does not infinitely expand the scope of discovery under Rule 26(b) of the Federal Rules of Civil Procedure as plaintiff seems to suggest (Br. 37-38). There is no correlation between the value of the services rendered to the class by counsel for plaintiff and the amount of the legal fees paid to counsel for defendant. There is no basis for equating the time and expertise required for the prosecution and for the defense of this action. And there is no justification

for disregarding the very different relationship that exists between plaintiff's counsel and the class and between defendant's counsel and its client.

Grinnell requires that counsel for plaintiff make a detailed showing of time spent and rate of compensation as well as of other factors which reflect the benefit bestowed upon the class. This obligation may not be avoided or compromised by shifting the focus of attention to the legal fees earned by counsel for defendant. That this was plaintiff's purpose is demonstrated by the statement that the information sought "would be a meaningful measuring rod for determining a reasonable fee for counsel for the appellant" (Br. 40). Grinnell does not authorize the use of such a "measuring rod". The questions posed in plaintiff's interrogatories are ones which should properly be addressed and responded to by counsel for plaintiff. And the documents called for in plaintiff's requests to produce are ones which should properly be prepared and presented by counsel for plaintiff. Such discovery directed against defendant is needlessly intrusive and irrelevant.

- B. The amount and manner of calculating defendant's legal expenses in the defense of this action is protected from discovery by the attorney-client privilege.

The terms and conditions of the retainer agreement between attorney and client is confidential and privileged information which is not subject to disclosure at the

instance of an adverse party in a civil action. Plaintiff's interrogatories and requests to produce sought to discover the amount of defendant's legal expenses as well as details on individual billing rates which might have been used by counsel in preparation of the statements rendered to the client. While making such demands upon defendant, plaintiff carefully avoided revealing the terms and conditions of the retainer agreement between plaintiff and plaintiff's counsel although this Court in Grinnell held that "[s]uch information is vital to the determination of a just and adequate fee," 495 F.2d at 473.

The most pertinent statement on the subject of privilege and a party's right to resist discovery of a retainer agreement is contained in Judge Kaufman's decision in Magida v. Continental Can Co., 12 F.R.D. 74 (S.D.N.Y. 1951), aff'd, 231 F.2d 843 (2d Cir.), cert. denied, 351 U.S. 973 (1956). This was a derivative and class action brought by a shareholder to recover profits on "short-swing" securities transactions. At depositions conducted by defendant, plaintiff and his attorney were asked questions designed to bring out the terms of their retainer agreement. Objection was made on the ground of attorney-client privilege. On defendant's motion to compel answers, the court sustained plaintiff's objection and refused to order the disclosure of this information. It held:

Defendant further argues that there is no privilege as to terms of a retainer between attorney and client. He asks the Court to sustain those questions concerning the agreement.

The authorities are substantially uniform against allowing any privilege as to the fact of retainer or identity of the client. *U.S. v. Pape*, 2 Cir., 1944, 144 F.2d 778. There is a sensible reason for this. 'The retention of counsel was to call the privilege into operation. The privilege itself was to extend only to communications between a client and an attorney who had been retained. The name or identity of the client was not the confidence which the privilege was designed to protect.' *People ex rel. Vogelstein*, supra. [150 Misc. 714, 270 N.Y.S. 367.]

I think it significant that these cases talk in terms of the 'fact' of retention and not the 'facts'. I agree that the existence of a retainer is outside the privilege. I am unwilling to extend the principle to the actual terms of that retainer." [emphasis added] 12 F.R.D. at 77.

Also instructive is *Miller v. Stern*, 262 App.Div. 5 (1st Dept. 1941) which was an action for abuse of process brought by an attorney against another attorney and his client for having named him as a defendant in a prior suit and having obtained an ex parte order subjecting him to pre-trial examination for the alleged purpose of obtaining confidential matters and communications, harassment, and destroying his usefulness in that prior suit. The court found that the complaint did not state a cause of action for abuse of process but granted leave to serve an amended complaint for malicious prosecution. It observed:

The only alleged element of damage which remains to sustain the tort of abuse of process is that plaintiff was compelled to reveal privileged communications made to him by his client. This allegation is a pure

conclusion of law. If the communications were privileged and were not germane to the law suit in which plaintiff was made a party, there appears to be no valid reason why the privilege could not have been asserted by plaintiff at the time when questions which might violate the confidential relationship between the plaintiff and his client were propounded to him. (Civ. Prac. Act §353.) An attorney may not be compelled at the instance of hostile litigant to disclose his retainer or the nature of the transactions to which it related when such information could be made the basis of a suit against his client. (Matter of Shawmut Mining Co., 94 App.Div. 156, 163.)" [emphasis added] 262 App.Div. at 7.

See also Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965), State v. Dawson, 90 Mo. 149, 1 S.W. 827 (1886), Code of Professional Responsibility, Canon 4, EC 4-1, 4-5, DR 4-101(B).

Defendant should not be required to disclose the amount of its legal expenses and the manner in which its attorneys calculate their fees when such information is sought solely for the benefit of counsel for plaintiff and when counsel for plaintiff has other ways to establish the value of his services to the class.

Plaintiff asserts that "[t]he nature and amount of legal fees are not confidential communications necessary for the rendition of a legal opinion or advice," and that "it has been uniformly held that such fee arrangements must be revealed" (Br. 39-40). The cases cited however do not support the stated proposition.

• As Judge Kaufman pointed out in Magida, there is a distinction between disclosure of the existence of an attorney-client relationship and disclosure of the terms of

the retainer agreement, 12 F.R.D. at 77. The fact that an attorney-client relationship exists is not itself privileged: United States v. Pape, 144 F.2d 778, 782 (2d Cir. 1944) ("The authorities are substantially uniform against any privilege as applied to the fact of retainer or identity of the client."); Behrens v. Hironimus, 170 F.2d 627, 628 (4th Cir. 1948) ("The apposite rule here seems to be correctly stated in 70 Corpus Juris, Witnesses, Section 502: 'The existence of the relation of attorney and client is not a privileged communication.'"); Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962) ("Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client.") Plaintiff's reliance upon these cases to support his position is misplaced since there has never been any question about the existence of an attorney client relationship between defendant and the law firm which has appeared on its behalf throughout this litigation. These cases cannot therefore be used as authority to extend the reach of discovery beyond the fact of the existence of an attorney-client relationship and into the terms of the retainer agreement.

An inquiry into the receipt of legal fees has also been allowed for the limited purpose of determining the existence of a conflict of interest on the part of an attorney: In re Michaelson, 511 F.2d 882, 888 (9th Cir.), cert. denied, 421 U.S. 978 (1975), ("The courts have the right to inquire into fee arrangements both to protect the client from excessive fees and to assist an attorney in the collection of his fee, but more importantly, the court may inquire into the arrangements to protect against suspected conflicts of interest"); Bailey v. Meister Brau, 55 F.R.D. 211, 214 (N.D.Ill. 1972) ("Plaintiff's position is that Foster's fees from Meister Brau may have been a reward for improper cooperation in the purchase of the Black Company.") Plaintiff's reliance upon these cases to support his position is also misplaced since there has never been any suggestion of conflict of interest on the part of counsel for defendant. These cases cannot therefore be used as authority to compel disclosure not for the purpose of policing the bar and preventing wrongdoing but to assist a private litigant in obtaining an award of attorney's fees.

The other cases cited by plaintiff do not pertain to the disclosure of retainer agreements but rather involve particular questions as to the availability of the attorney-client privilege in shareholder actions, Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied,

401 U.S. 974 (1971), Valente v. Pepsico, 68 F.R.D. 361 (D.Del. 1975), and complex patent and antitrust discovery proceedings, Duplan Corp. v. Deering Milliken, 397 F.Supp. 1146 (D.S.C. 1974). They do not therefore add anything to plaintiff's argument.

The retainer agreement that exists between an attorney and client is of the utmost confidentiality. It involves matters of compensation and billing practice that were never intended to be revealed to third parties and certainly not to adverse litigants. There is no justification for intruding into this area and requiring the disclosure of the amount and details of the legal expenses incurred in the defense of this action. In an application for an award of attorney's fees, plaintiff should be put to his proof under Grinnell and not be permitted to argue for an increased allowance on the basis of defense costs, all at the expense of defendant's confidential relationship with its counsel.

CONCLUSION

The judgment of the district court should be affirmed.

March 1, 1977

Respectfully submitted,

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APPENDIX A

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9-15-75
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2112 covered

: CIVIL ACTION

SEP 18 1975

By ME Dep. Clerk

: NO. 72-2343

FINDINGS OF FACT

1. On November 27, 1972, plaintiffs Acker and Dabrow instituted an action individually and on behalf of a similarly situated class of "Master Charge" and "BankAmericard" cardholders against defendants Provident National Bank and Philadelphia National Bank.

2. Defendants were initially alleged to have violated, inter alia, the National Bank Act (12 U.S.C. §§ 85, 86), the Pennsylvania Goods and Services Installment Sales Act of 1966 (Pa. Stat. Ann. Tit. 69 § 1101 et seq., the Pennsylvania Banking Code of 1965 (Pa. Stat. Ann. Tit. 7 § 301 et seq.) and the Truth-In-Lending Act (15 U.S.C. § 1640).

3. Defendants have rendered "Master Charge" and "BankAmericard" credit card services to a large number of cardholders, in excess of 500,000, during the time period at issue.

4. Defenliants' Master Charge and BankAmericard plans are both operated on the basis of billing cycles.

5. The last day of the billing cycle is known as the billing date.

6. On the billing date, all transactions (purchases, payments, credits) posted to an account during that billing cycle are reviewed by computer, and a finance charge, if any, is imposed.

7. A summary of the resulting information is printed by the computer on a statement (the "monthly statement") which is thereafter mailed to the cardholder.

8. No finance charges are imposed on purchases when they first appear on the periodic statement as new charges.

9. If the cardholder pays the entire outstanding balance of his account before the next billing date (a period of about 25 days), he will incur no charges on those new purchases (this is known as the "free ride" provision).

10. If the cardholder does not pay the outstanding balance, a service charge, also described as a "finance charge", will be imposed on the amount billed to the cardholder in respect of those purchases, but only from the billing date on which the purchases first appeared on the monthly statement, and not from the date of the actual purchase.

11. As to Provident Master Charge accounts prior to October 1972 and PNB accounts prior to March 26, 1975, if a payment ~~were~~ not received in a particular billing period, the total of the amounts which formed the beginning balance for the next billing period included in some instances finance charges for the previous billing period, so that, in those instances, a finance charge was imposed in that next month on a balance which included a prior and unpaid finance charge from the prior month.

12. Plaintiff Dabrow has been a Provident Master Charge cardholder since June, 1970.

13. Dabrow and Acker have been PNB BankAmericard cardholders since November 5, 1966 and March 11, 1970 respectively.

14. Count I of plaintiffs' Complaint claimed that defendant banks were charging usurious interest in excess of the 12% per annum rate permitted under the Pennsylvania Banking Code of 1965.

15. Count IV of their Complaint alleged that defendants were violating the Pennsylvania Goods and Services Installment Sales Act by charging interest on interest; i.e., by compounding service charges through the computation which imposed a service charge on a balance which includes a prior unpaid service charge.

16. Count VI of plaintiffs' Complaint also asserted that defendant Provident charged a monthly service charge in each 31 day month from November 28, 1970 to October 1971 in excess of 1.25% in violation of the Goods and Services Installment Sales Act and the National Bank Act.¹

17. Plaintiffs initially moved for class certification and summary judgment on the grounds set forth in Counts I, IV and VI; defendants opposed class certification and also moved for summary judgment pursuant to Rule 56.

18. In Acker v. Provident National Bank, 373 F. Supp. 56 (E.D. Pa. 1974), this Court entered summary judgment in favor of defendants on Count I, IV and VI holding that, as to Count I, defendant banks were authorized to charge the maximum amount (15% per annum) allowed under the Pennsylvania Goods and Services Installment Sales Act, and, as to Count IV, that the imposition of service charges on a balance which included a previously unpaid service charge was not prohibited in the absence of a legislative decree to the contrary, and further that, even with such compounding, defendants' effective rate of interest was conceded not to exceed the level authorized by the Sales Act.

¹/ Counts II, III and V were dismissed without plaintiffs' objection by the Trial Court. Acker v. Provident National Bank, 373 F. Supp. 56, 60 (E.D. Pa. 1974).

19. This Court also denied plaintiffs' motion for class action certification as moot.

20. Plaintiffs appealed the entry of summary judgment with respect to Counts I and IV.²

21. In Acker v. Provident National Bank, 512 F.2d 729 (3d Cir. 1975) the Court of Appeals affirmed this Court's holding that defendants lawfully might impose a service charge at the maximum 15% rate (1-1/4% per month) authorized by the Sales Act, rather than the 12% maximum rate (1% per month) established by the Pennsylvania Banking Code.

22. As to Count IV, the Court of Appeals held that Pennsylvania law required not merely an absence of expression, but rather the presence of an express, affirmative statement in the Sales Act approving the charging of compound interest before the imposition of a service charge on a balance which included a prior, unpaid service charge would be allowed; the Court of Appeals accordingly reversed the decision of this Court as to Count IV, and remanded the case for further proceedings, expressly reserving for this Court the disposition of plaintiffs' Motion for Class Action Certification.

23. Defendants thereafter petitioned for a rehearing as to Count IV, or, in the alternative, for a rehearing en banc.

24. Defendants' Petition for Rehearing was denied on March 20, 1975.

25. Provident had ceased the practice of imposing a service charge on a balance which included a prior, unpaid service charge prior to the institution of the instant action; counsel for Provident have represented to this Court that Provident will not resume the practice in the future; the Court finds that there is no reason to believe that Provident will resume use of that method.

^{2/} Plaintiffs did not appeal from the summary judgment in favor of Provident on Count VI.

26. Philadelphia National Bank admittedly engaged in the method of computation held unlawful by the Court of Appeals until shortly before the issuance by the Court of Appeals of its mandate following the denial of rehearing of the Court of Appeals decision.

27. Plaintiffs have renewed and vigorously pressed their Motion for Class Action Certification, which Motion is vigorously opposed by defendants; extensive discovery has been taken by plaintiffs, both before and after the Court of Appeals decision, in respect to class action issues.

28. Plaintiffs' renewed motion seeks certification pursuant to Fed. R. Civ. P. 23b(2) and 23b(3).

29. Plaintiffs purport to be representing the following classes and subclasses of Provident Master Charge and PNB BankAmericard cardholders:

- a. The class of plaintiffs, consisting of all persons or entities who are current holders of Master Charge cards issued by the defendant, Provident National Bank, prior to December 1, 1972;
- b. The class of plaintiffs, consisting of all persons or entities who are current holders of BankAmericard cards, issued by defendant, Philadelphia National Bank;
- c. The class of plaintiffs, consisting of all persons or entities who, presently or at any time since November 27, 1970, are or were holders of Master Charge cards issued by the defendant, Provident National Bank, and were charged and paid compound interest, or interest on interest, on their Master Charge account;
- d. The class of plaintiffs, consisting of all persons or entities who, presently or at any time since November 27, 1970, are or were holders of BankAmericard cards issued by the defendant, Philadelphia National Bank, and who were charged and paid compound interest, or interest on interest, on their BankAmericard account; and

- e. The sub-class of plaintiffs, consisting of all persons or entities who are holders of Master Charge cards issued by defendant Provident National Bank, or of BankAmericard cards issued by defendant Philadelphia National Bank, and who have been charged, but have not yet paid, compound interest, or interest on interest, on their respective accounts.

30. Plaintiffs, in recognition of the fact that the class action issue is critical to the ultimate success of their action, have vigorously pursued their theories for certification, and have filed numerous briefs in support thereof.

31. In that plaintiffs have prevailed on the merits only as to Count IV of their Complaint, which affects only a small proportion of all Provident and PNB cardholders, the factual issues relevant to class action certification are different (as set forth in paragraphs 32 through 34 inclusive), from those which might otherwise have been presented.

32. All of defendants' records in respect of the identities and transactional histories of their respective Master Charge and BankAmericard cardholder accounts have been reduced to microfilm, and the papers and electronic data processing media, principally magnetic tapes, on which such identities and transactional histories were from time to time maintained, have been routinely erased or discarded in the ordinary course of business.

33. As a result of the routine erasure in the ordinary course of business of electronic data processing media, the expense to Provident to reconstruct the account histories of Provident's Master Charge cardholders to determine which cardholders had been charged excess service charges as the result of the illegal "compounding" found to exist by the Court of Appeals would be in excess of \$130,000 to determine which cardholders had been charged excess service charges; the total amount of such excess service charges imposed by Provident would be a small fraction of that \$130,000.

34. In that Philadelphia National Bank does not maintain on microfilm certain "trial balances" summarizing the status of accounts (which "trial balances" are maintained by Provident National Bank on microfilm), the expense to Philadelphia National Bank of reconstructing the account histories of its BankAmericard cardholders during the relevant time period would be substantially greater; the cost to Philadelphia National Bank to reconstruct the account histories of its cardholders would be in excess of \$3,500,000 in order to determine which cardholders had been charged excess service charges; the total amount of such excess service charges imposed by PNB would be a small fraction of that \$3,500,000.

SEP 15 1975

CONCLUSIONS OF LAW

JOHN J. HARDING, Clerk
By ATC Dep. Clerk

1. Class action certification under Rule 23b(3) of the Fed. R. Civ. P. will be denied under the unique factual circumstances herein presented where the administrative burden and expense of retrieving the information necessary and relevant to a determination of class certification is great in magnitude when contrasted with the relatively insubstantial amount which defendants are alleged to have overcharged their cardholders as well as the defendants' asserted liability under 12 U.S.C. § 85. Compare Turoff v. Union Oil Company of California, 61 F.R.D. 51 (N.D. Ohio 1973).

2. A b(3) class action is not the superior legal method for achievement of the fair and efficient adjudication of the instant controversy because the severe burdens which maintenance of this litigation in class action form would impose upon defendants and the judicial process are far in excess of the actual harm caused by defendants' conduct: Compare Turoff v. Union Oil Company of California, 61 F.R.D. 51 (N.D. Ohio 1973); however, the decision

in this case on these facts does not necessarily provide a precedent for related but different cases whose facts may be distinguishable from the unique circumstances presented herein.

3. With respect to plaintiffs' request for certification under Rule 23b(2) and prayer for injunctive relief, this Court will deny relief as against defendant Provident National Bank because Provident has demonstrated to the satisfaction of this Court that there is no reasonable expectation that the wrong will be repeated; in fact, said conduct was terminated by Provident prior to the institution of the instant suit. United States v. W. T. Grant Co., 345 U.S. 629 (1952).

4. However, plaintiffs' request for certification of a b(2) class action and prayer for injunctive relief against defendant Philadelphia National Bank will be granted since defendant PNB has acted on grounds generally applicable to a class composed of all of its past and present BankAmericard holders, and on these facts PNB cannot as a matter of law sustain its burden of proof that the illegal practices will not be repeated.

5. As the result of the prosecution of the instant action by plaintiffs' counsel, a substantial benefit has been conferred upon the entire plaintiff class, and the award of reasonable attorney's fees is justified where such substantial, though admittedly non-monetary benefit, has been conferred. Mills v. Electric Auto-Lite, 396 U.S. 375 (1969); Hall v. Cole, 412 U.S. 1 (1972); Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975).

6. The defendants do not urge that the recent Supreme Court decision in Aleaska Pipeline Serv. v. Wilderness Soc., 44 L. Ed. 2d 141 (1975), bars an award of counsel fees under the circumstances and this Court accordingly need not decide whether

an award of counsel fees is precluded by that decision.

7. In determining the reasonableness of the counsel fees to be awarded, this Court has been aided by the willingness of opposing counsel to stipulate to the appropriate monetary values necessary to apply the calculations mandated by Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) and Merola v. Atlantic Richfield Co., supra, and the Court determines that the attorney's fee to which plaintiffs' counsel are entitled is \$200,000; the Court reserves all questions of allocation of such fee as against one or both of the two defendants and directs counsel for defendants to report in writing within ten days whether a further hearing is necessary to determine such allocation.

SEP 15 1975

PERMANENT INJUNCTION

JOHN J. HARDING, Clerk
By [Signature] Dep. Clerk

Upon the foregoing Findings of Fact and Conclusions of Law and pursuant to the Opinion and Order of the Court of Appeals dated February 21, 1975, it is hereby

ORDERED and DECREED

that defendant The Philadelphia National Bank is permanently enjoined against imposing or collecting a service charge or finance charge upon such portion, if any, of an outstanding balance in a "BankAmericard" retail installment account as constitutes a prior, unpaid service charge or finance charge.

In the event that defendant The Philadelphia National Bank should hereafter certify to the Court that the law of Pennsylvania has changed in respect of the compounding of service charges on retail installment accounts, either by legislative action or otherwise,

the Court retains jurisdiction for the purpose of determining whether or not such change has occurred and whether this injunction should be amended or terminated in consequence of such change in the law of Pennsylvania.

BY THE COURT:



✓ Dated: September 12th, 1975

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APPENDIX B

FILED

AUG-1 1975

CLARENCE E. CASELL, COUNTY CLERK

E. J. Tassanoff

BY E. J. TASSANOFF, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JOHN SERRANO, JR., et al.,)

Plaintiffs,) NO. C-938 254

vs.)

ORDER CONCERNING ATTORNEYS' FEES

IVY BAKER PRIEST, et al.,)

Defendants.)

Attorneys for plaintiffs moved this Court on September 30, 1974, to award reasonable attorneys' fees for their representation of the plaintiffs in the instant case. The motion was fully briefed by both parties and oral argument was heard on three occasions: on the matter of the entitlement of plaintiffs' attorneys to a court-awarded fee on January 6, 1974; on setting the amount of fees on April 14, 1974; and on the Findings of Fact and Conclusions of Law on July 7, 1975. Findings of Fact and Conclusions of Law are being filed by the Court simultaneously with the instant Order and are hereby incorporated by reference. The Court having considered all of the same and being fully advised in the premises,


IT IS HEREBY ORDERED that Public Advocates, Inc. and Western Center for Law and Poverty, attorneys for Plaintiffs, are each entitled under the private attorney general doctrine to receive reasonable attorneys' fees from the defendants, Jesse M. Unruh, Kenneth Cory, and Wilson C. Riles, in their

representative capacities.

IT IS FURTHER ORDERED that \$400,000 is a reasonable attorneys' fee for the representation by Public Advocates of the plaintiffs from the beginning of the instant action through April 14, 1975.

IT IS FURTHER ORDERED that \$400,000 is a reasonable attorneys' fee for the representation by Western Center on Law and Poverty of the plaintiffs from the beginning of the instant action through April 14, 1975.

DATED: AUG - 1 1975


Judge, Superior Court, State of
California

Copy Paid
Mar 1 1977
J. L. Brown
att'y f. l. l